



R. Lyle Key, Jr.
Assistant General Counsel
Admitted in Alabama and Kentucky
Not Admitted in Florida

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FEDERAL ELECTION
COMMISSION
OFFICE OF LEGAL
COUNSEL

Nov 25 9 37 AM '96

Law Department
500 Water Street
Speed Code J-150
Jacksonville, FL 32202
Fax (904) 359-1248
Telephone (904) 359-3100
Writer's direct telephone line:

(904) 359-1251

November 21, 1996

Colleen T. Sealander, Esq.
Attorney
General Counsel's Office
Federal Election Commission
Washington, D. C. 20463

Re: MUR 4545

Dear Ms. Sealander:

This is in response to your letter dated November 4, 1996 advising Alan A. Rudnick that the Republican National Committee ("RNC") had filed a complaint indicating that CSX Corporation ("CSX") may have violated the Federal Election Act of 1971, as amended (the "Act"). Mr. Rudnick received your letter in his capacity as CSX Corporation's Registered Agent on November 8, 1996.

The RNC's complaint is based upon news reports and upon vague and sometimes disjointed statements by White House spokesman Mike McCurry. It is exceedingly difficult to discern from the RNC's complaint the nature or extent of any alleged violations by CSX Corporation. The RNC's complaint does allege that the Clinton for President Primary Committee ("Clinton-Gore '96") paid substantially less than the full costs associated with operating a special train for President Clinton in August of 1996. CSX subsidiary CSX Transportation, Inc. ("CSXT") was one of the rail carriers involved in operating that Presidential Special, and the Commission seems to be inferring that if Clinton-Gore '96 truly paid less than the full cost of that special train operation, CSX's subsidiary may have made an improper campaign contribution by absorbing some of the costs it incurred in conjunction with that operation. This response will henceforth refer to CSXT rather than CSX since CSXT was the corporate entity involved in the operation of this special Presidential train.

CSXT had no contractual relationship with Clinton-Gore '96. Its involvement with the train trip at issue was required by a pre-existing contract with Amtrak and by statute. Thus, there was not and could not have been any impermissible campaign contribution by CSXT in conjunction with the operation of the

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involved special Presidential train. Instead, the train was operated as an Amtrak special, and CSXT has billed Amtrak for all of the costs it incurred in conjunction with that operation. Thus, CSXT did not absorb any costs associated with the Amtrak special. Moreover, CSXT has no information with respect to how much either Clinton-Gore '96 or any other entity paid for the Amtrak special. CSXT's arrangement with Amtrak is discussed more fully in the attached Affidavit of CSXT Assistant Vice President-Passenger Services Richard H. Young, Jr. Mr. Young's Affidavit is identified as Exhibit 1 and incorporated as part of this response.

As Mr. Young explains, Amtrak's Vice President Operations called his office on June 25, 1996 to advise CSXT that Amtrak was planning to operate a special Presidential train over certain CSXT rail lines. (Ex. 1 at 2-3). Mr. Young goes on to point out that Amtrak's Presidential special ran over CSXT trackage from Huntington, West Virginia to Columbus, Ohio. (Ex. 1 at 3). Mr. Young also notes that this operation actually involved three special passenger trains - a pilot train, the Presidential train, and a chase train - and that all three of those trains were operated as Amtrak specials. [Ex. 1 at 3-4).

Pursuant to Section 3.2 of the CSXT-Amtrak Operating Agreement (the "Operating Agreement"), CSXT is obligated to operate special train service requested by Amtrak. Amtrak runs an average of at least one Amtrak special a month over CSXT lines. A copy of Section 3.2 of the Operating Agreement is attached, marked Ex. 2, and incorporated as part of this response. That section provides in pertinent part that:

"[Amtrak] shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement, [CSXT] hereby agrees to provide modified or additional services."

Section 3 of the Operating Agreement is consistent with the provisions of 49 U.S.C. § 24308 which authorizes Amtrak to enter into a contract with a rail carrier to provide for Amtrak's use of that rail carrier's facilities and services. That statute further provides that if Amtrak and a rail carrier are unable to reach agreement with regard to such matters, the Interstate Commerce Commission ("ICC") (now the Surface Transportation Board) shall order the involved rail carrier to provide the needed facilities and services to Amtrak and prescribe reasonable terms and compensation for providing such facilities and services. 49 U.S.C. §24308(a)(2)(a). Pursuant to its authority

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under that statute, the ICC has found that Amtrak is entitled to operate excursion trains both on and off its regular service routes. E.g., Amtrak and Soo Line RR - Use of Tracks and Facilities and Establishing Just Compensation, Finance Docket No. 31062, 1987 ICC LEXIS 239 (June 25, 1987). A copy of the ICC's decision in Finance Docket No. 31062 is attached as Exhibit 3 for convenient reference.

It is thus clear that CSXT was obligated by both contract and federal statute to provide the facilities and services requested by Amtrak. It was immaterial to CSXT that the train was being operated for the President of the United States because CSXT would have nonetheless been under a contractual obligation to provide the train to Amtrak upon its request.

In Exhibit 1, Mr. Young also explains that CSXT went to great lengths to identify all actual costs and additives associated with the involved Amtrak Presidential special and on November 14, 1996, sent Amtrak a bill for those charges. [Ex. 1 at 2]. As Mr. Young goes on to discuss in some detail, CSXT computed the charges payable for this Amtrak Presidential special on the same basis it would compute the charges due for any other Amtrak special train operation. For instance, the two CSXT locomotives used on the chase train were leased to Amtrak for the \$15.00 per hour plus fuel rate specified in Table 1 of Appendix III to the Operating Agreement. Amtrak's charges for leasing those two CSXT locomotives were based upon the full five-day period those locomotives were committed to this special train operation. [Ex. 1 at 5]. This bill was prepared in the ordinary course of accumulating expenses for the Amtrak special and presented to Amtrak in the ordinary course of business.

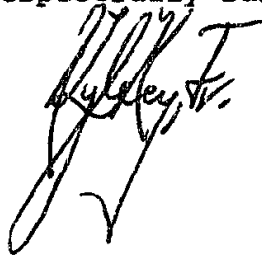
In the concluding portion of his Affidavit, Mr. Young notes that he has no knowledge of Amtrak's arrangements for billing Clinton-Gore '96 or any other organization which may have been involved in the operation of this Amtrak Presidential special. He also states that he has no knowledge of the billing arrangements Amtrak has with the other two rail carriers which were involved in this special train movement. He does reiterate, however, "...that CSXT has made every effort to recover all its costs and other allowable charges pursuant to the CSXT-Amtrak Operating Agreement...." Under these circumstances, it is clear that neither CSXT nor CSX violated the Act through its participation in the operation of the involved Amtrak Presidential special, and CSX should therefore be dismissed as a respondent in this proceeding.

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Please acknowledge receipt of this response by stamping the enclosed copy of this letter's first page with the date received and return it to me in the enclosed pre-addressed envelope.

Thank you for your consideration and please call or write me if you have any questions or need any further information.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "Colleen T. Sealander". The signature is stylized with a large, sweeping initial "C" and a long, horizontal stroke extending to the right.

RLK/mhr

Enclosures

Colleen T. Sealander, Esq.
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Blind copies - with enclosures

Carol A. Laham, Esq. - Via telecopier - (202/429-7207)
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Douglas R. Maxwell, Esq.
General Counsel
CSXT

Rachel Geiersbach, Esq. - Via telecopier - (8-422-1356)
Assistant Corporate Secretary
CSX Corporation
Richmond

Bill Johnson, Esq. - Via telecopier (215/209-4817)
Associate General Counsel
Conrail
Philadelphia, PA

v:\staff\mhr\sealandc.rik

AFFIDAVIT

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

On this date, the undersigned Affiant Richard H. Young, Jr., who is personally known to me, appeared before me, and after first being duly sworn, made the following statement under oath.

My name is Richard H. Young, Jr., and I am employed by CSX Transportation, Inc. ("CSXT") as its Assistant Vice President Passenger Services. My office is in the CSXT General Office Building at 500 Water Street in Jacksonville, Florida 32202. I began my railroad career on June 10, 1956 with the Chicago and North Western Railway Company, and during my 40 years of railroad service, I have worked in various jobs including the following: Trainman, Fireman, Engineer, Freight Sales Representative, Assistant Superintendent, and Director of Passenger Operations. I was appointed to my current position on January 1, 1990.

As AVP Passenger Services for CSXT, I am responsible for operating and administrative matters associated with passenger train operations on CSXT's railroad system. Those passenger operations consist of intercity passenger trains operated under the auspices of Amtrak, commuter trains sponsored by various public authorities which operate over CSXT trackage in the District of Columbia, Florida, Maryland, Virginia, and West Virginia, and occasional special trains sponsored by various organizations or operated for our own company purposes. I have a staff of 20 people.

I have been told that the Republican National Committee has filed with the Federal Election Commission a complaint alleging that CSXT's parent CSX Corporation may have violated the Federal Election Campaign Act of 1971 by absorbing a portion of the costs it incurred in conjunction with the Presidential special which operated over CSXT's line of railroad from Huntington, West Virginia to Columbus, Ohio in August of 1996. As I understand it, one allegation in the complaint is that by that alleged absorption of costs, CSX may have made a prohibited corporate contribution to Clinton-Gore '96. That allegation is wholly unfounded.

As I will explain more fully below, the involved Presidential special was an Amtrak train, and CSXT handled it like we would any other Amtrak special. As CSXT's chief liaison officer with Amtrak, I personally was involved with planning, implementing, and setting up billing arrangements for this Presidential special. As with all special trains, CSXT identified all actual costs and additives associated with the involved Amtrak Presidential special, and on November 14, 1996, in the ordinary course of business, we sent Amtrak a final bill for \$238,959.75 for this operation.

This bill was prepared pursuant to our normal procedures for Amtrak specials, and it was sent to Amtrak as soon as we were confident that we had identified all related costs. Payment for this bill will be due pursuant to our standard arrangement with Amtrak which calls for payment of 70 percent of

the bill within 11 days of receipt and the balance within 30 days of receipt.

By way of background, CSXT and Amtrak have a contractual agreement which requires CSXT to provide special train movements to Amtrak upon request. The trains are provided at a standard mileage rate which is also established by contract. To the extent any additional costs are incurred by CSXT in the operation of these special trains, these costs are also passed on to Amtrak. In addition to this contractual provision, Amtrak has a statutory right of access to CSXT's facilities. On average, Amtrak runs a special train over CSXT lines at least once a month. Amtrak operates these trains for school safety patrols, railroad historical societies, state departments of transportation, and Amtrak's own business purposes, e.g., football specials and ski trains. Whatever the purpose, however, CSXT is obligated to let Amtrak use its lines for these special trains.

With respect to the specific subject matter of the complaint, the train trip taken by President Clinton between August 24 and August 28, 1996 to the Democratic National Convention, it was an Amtrak special. Thus, CSXT's sole involvement in the trip was through its contractual relationship with Amtrak and there was no contractual agreement between Clinton-Gore '96 and CSXT. Moreover, those of us at CSXT have no

knowledge or information regarding how much either Clinton-Gore '96 or any other entity paid Amtrak for the operation of the Presidential special. Rather, we can attest only to the general course of business between CSXT and Amtrak.

Thus, on June 25, 1996, my office received a call from Amtrak Vice President-Operations Bob Vanderclute advising CSXT that Amtrak was planning to use some of our rail lines for a special passenger train operation for the President of the United States. Within the railroad industry, such Presidential specials are referred to as "POTUS trains." Mr. Vanderclute left a message requesting that I contact Danny Boehr who would serve as Amtrak's point man for the contemplated POTUS train operation. I contacted Mr. Boehr as requested, and on July 16, 1996, I represented CSXT at a planning meeting at Amtrak's headquarters in Washington. As indicated above, once Amtrak makes a request to use our rail lines for a special train, CSXT is under an obligation to provide Amtrak access to its lines whether or not the special train is for the President of the United States. Mr. Boehr chaired the meeting since the train would be operated as an Amtrak special, and the meeting was also attended by representatives of Consolidated Rail Corporation ("Conrail") and Grand Trunk Western Railroad, Inc. ("GTW") since those railroads would also be involved in the POTUS train operation. Amtrak ultimately decided to operate the Presidential special over the following route:

Huntington, West Virginia to Columbus, Ohio
Columbus, Ohio to Detroit, Michigan
Detroit, Michigan to Battle Creek, Michigan
Battle Creek, Michigan to Michigan City, Indiana

The only portion of this train's route on CSXT lines was that from Huntington, West Virginia to Columbus, Ohio. On August 21, 1996, I issued instructions (attached as Appendix A) to our involved transportation officials which stated in pertinent part:

"These special trains will be operated under the terms of the CSXT/Amtrak Operating Agreement covering movement and storage charges. Any additional charges must be reported to Passenger Services for rebilling to Amtrak."

Those instructions are consistent with those issued for all Amtrak special trains, and they reflect our standard practices on billing.

The POTUS train operation actually involved three Amtrak special trains:

1. A pilot train consisting of two Amtrak locomotives, two Amtrak cars, and CSXT business car No. 318 - the Georgia.
2. The POTUS train itself consisting of three Amtrak locomotives, eleven Amtrak cars, a privately-owned office car leased by Amtrak, and the former Georgia Railroad No. 300, which was being leased to CSXT.

3. A chase train consisting of two CSXT locomotives, CSXT power car No. 363 - the Kentucky, and CSXT business car No. 317 - the Baltimore.

The three Amtrak specials involved in the POTUS train operation left Huntington, West Virginia on Sunday, August 25, 1996 and ran to Columbus, Ohio via CSXT. The Amtrak specials arrived in Columbus on the evening of August 25, and CSXT interchanged them to another railroad in Columbus on the morning of August 26. That was the extent of the actual POTUS train movement over CSXT. Our billing to Amtrak, which was prepared in the ordinary course of accumulating expenses, covers all of CSXT's costs for the POTUS train movement itself and for all related activities.

The four passenger cars provided by CSXT (i.e., The Baltimore, the Georgia, the Kentucky, and the leased Georgia 300) were leased to Amtrak at the industry standard reciprocal rate of \$200.50 per day for each day consumed from the time each car departed its home base until it returned. This is the standard reciprocal rate that CSXT charges any other railroad for use of its business cars. This was also the rate for which CSXT leased the Georgia 300, and that lease was based on the same standard rate of \$200.50 per day. CSXT's total charges to Amtrak for leasing those four passenger cars amount to \$9,223.00.

The two CSXT locomotives on the chase train were each leased to Amtrak for \$15.00 per hour plus fuel. That lease rate worked out to \$360.00 per day for each locomotive. This rate is

established by the CSXT-Amtrak Operating Agreement, Table 1 of Appendix III. The two involved CSXT locomotives were committed to this special Amtrak POTUS train operation for five days, and the total lease charges worked out to \$3,600.00.

Since these were special rather than regularly scheduled Amtrak movements which for the most part operated over non-Amtrak routes, CSXT provided train and engine crews for the operations over its lines from Huntington to Columbus. CSXT's charges to Amtrak covered the actual amount of the wages earned by those train and engine crews in conjunction with the operation of the three Amtrak special trains, plus applicable fringe benefits, pursuant to the CSXT-Amtrak Operating Agreement, Table 1 of Appendix III.

CSXT also provided a chef and a steward for the Baltimore, the Georgia, and the Georgia 300 plus a mechanical rider for power car Kentucky. As would be the case with any special train, CSXT's bill to Amtrak included their wages, fringes, and expenses.

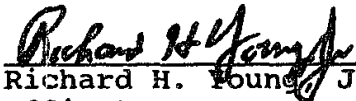
In addition to the previously mentioned charges for rental of motive power and equipment, labor charges for train and engine crews, and labor charges for on board service personnel, CSXT's bill to Amtrak included the same per mile track maintenance and liability charges applicable for any special or regularly scheduled Amtrak train as required by contract. It also includes the standard per gallon charge for diesel fuel used

by the Amtrak locomotives pursuant to Table 1 of Appendix III of the CSXT-Amtrak Operating Agreement.

CSXT's bill to Amtrak also included costs CSXT incurred in conjunction with providing special services for this Amtrak POTUS train operation. Such special services included constructing platforms at locations where the President delivered speeches, spiking switches along the POTUS train's route, and conducting special signal inspections. In addition to charging the labor costs associated with such services, CSXT's bill to Amtrak covered standard rental charges for company trucks during the time they were devoted to such activities.

In summary, the POTUS train operation was an Amtrak special, which involved three Amtrak trains. CSXT's dealings with Amtrak were in the ordinary course of business. I do not have any knowledge of Amtrak's arrangements for billing the organization or organizations which requested these special train operations. CSXT has made every effort to recover all its costs and other related charges pursuant to the CSXT-Amtrak Operating Agreement.

Further, Affiant sayeth not.

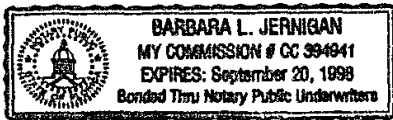

Richard H. Young Jr.
Affiant

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STATE OF FLORIDA)
) SS.
COUNTY OF DUVAL)

Be it remembered that on the 21st day of November, 1996, before me, the subscriber, a notary public within and for said County and State, personally appeared Richard H. Young, Jr., who is personally known to me and did not take an oath and represented that he is duly authorized in the premises, and acknowledged that he signed the foregoing Affidavit.

IN TESTIMONY WHEREOF, I hereto set my hand and official seal on the 21st day of November, 1996.



Barbara L. Jernigan
Signature of Notary

(OFFICIAL SEAL)

JACKSONVILLE, FL AUGUST 21, 1996

FILE: PS-355-LLR

APPENDIX A
— of EXHIBIT 1
Page 1 of 3

C&O BUSINESS UNIT, T. G. FROST	TiT, XSL, TIS
C&O TRANSPORTATION OFFICERS BROADCAST:	BCHUTRA
R. L. CART, HUNTINGTON, WV	TiT
A. F. CROWN, HUNTINGTON, WV	TIS
R. GRIFFITH, HUNTINGTON, WV	TiT
S. F. SANTER, HUNTINGTON, WV	TiT
B. R. MONTGOMERY, HUNTINGTON, WV	S4C
W. H. ROMINE, HUNTINGTON, WV	S9I
R. S. ZENISEK, HUNTINGTON, WV	T1W
DISPATCHER C&O BUSINESS UNIT	OP5
L. D. MIDKIFF, HUNTINGTON, WV	T9X
C. E. MCBRIDE, RUSSELL, KY	BWJ
T. B. SMIRL, HUNTINGTON, WV	R7N D&E
S. L. BETHEL, RUSSELL, KY	RUQ D5W
G. C. JONES, RUSSELL, KY	H9D
J. L. RIDDLE, COLUMBUS, OH	D1H
R. J. HALL, PAINTSVILLE, KY	F4L
L. A. SMITH, SOUTH CHARLESTON, WV	M1B
J. R. JOHNSON, RUSSELL, KY KY	F4B
R. A. SHIELDS, CHICAGO, IL	FAX: 312/855-2487
D. A. BOEHR, AMTRAK, WASHINGTON, DC	FAX: 202/906-2611
R. E. ROYSE, AMTRAK, JACKSONVILLE, FL	FAX: 904/766-5134
MARK OWEN, CONRAIL, PHILADELPHIA, PA	FAX: 215/209-7152

AMTRAK WILL OPERATE THREE SPECIAL TRAINS FOR THE UNITED STATES GOVERNMENT AND INVITED GUESTS OVER THE FOLLOWING ROUTE AND SCHEDULE UNDER THE DIRECTION OF D. A. BOEHR, AMTRAK DIRECTOR SYSTEM SUPPORT, AND THE UNITED STATES SECRET SERVICE (USSS), AS FOLLOWS:

CONSIST: FROM HUNTINGTON WV-C&O DEPOT

LEAD TRAIN: TWO AMTRAK F40-PH LOCOMOTIVES (BACK TO BACK)
AMTRAK 1700 BAGGAGE CAR
AMTRAK 10001 "BEECH GROVE" OFFICE CAR
CSXT 318 "GEORGIA" BUSINESS CAR

SECOND TRAIN: TWO AMTRAK F40 LOCOMOTIVES
ONE AMTRAK F40-PH LOCOMOTIVE
ELEVEN AMTRAK SUPERLINER COACHES
MKT 403 OFFICE CAR (IMPROPERLY POINTED)
GA 300 OFFICE CAR (PROPERLY POINTED)

THIRD TRAIN: TWO CSXT LOCOMOTIVES (BACK TO BACK)
CSXT 363 POWER CAR
CSXT 317 "BALTIMORE" BUSINESS CAR

TOTAL THREE TRAINS: 17 CARS AND 7 LOCOMOTIVES

SCHEDULE: FROM HUNTINGTON-C&O DEPOT SUNDAY, AUGUST 25TH

EXHIBIT 1
Page 11 of 12 .

LV HUNTINGTON-C&O DEPOT	1410
OR ASHLAND	1445
LV ASHLAND	1705
OR CHILLICOTHE	1900
LV CHILLICOTHE	2015
OR COLUMBUS (PARSONS YARD)	2115

APPENDIX A
of EXHIBIT 1
Page 2 of 3

FROM COLUMBUS (PARSONS YARD), MONDAY, AUGUST 26TH

LV COLUMBUS (PARSONS YARD)	1130
I/C TO CONRAIL (FRANKFORT ST.)	1200

THE SCHEDULE SHOWN IN CSXT STANDARD TIME. OPERATION OF THESE SPECIAL TRAINS WILL BE COORDINATED UNDER THE DIRECTION OF R. L. CART, GENERAL MANAGER.

GENERAL INSTRUCTIONS:

SUNDAY, AUGUST 25, 1996

UPON ARRIVAL COLUMBUS, OH, TRAIN NO. 1 (P98925) WILL PROCEED TO TRACK #20 PARSON'S YARD. TRAIN NO. 2 (P99025) WILL PROCEED TO CSXT BIDS TERMINAL FOR DETRAINING. AFTER ALL PASSENGERS HAVE DETRAINED, THE TRAIN WILL REVERSE AND PULL FORWARD INTO TRACK #20 IN THE MAIN YARD, FOLLOWED BY TRAIN NO. 3 (P99125) FOR CSXT WILL PROVIDE SERVICING (FUEL, POTABLE WATER, EXTERIOR WASHING AND TRASH REMOVAL.)

MONDAY, AUGUST 26, 1996

SPECIAL TRAIN WILL DEPART PARSON'S YARD WITH CSXT YARD CREWS AND CR PILOTS. TRAIN TO BE SPOTTED NORTH OF FISHER ROAD, ALONG SIDE POLICE ACADEMY WITH REAR CAR OF TRAIN #2 (P99025) NORTH OF CROSSING. CSXT CREW WILL DETRAIN AT THIS LOCATION. CONRAIL ROAD CREWS WILL BOARD TRAIN.

UNLESS OTHERWISE RESTRICTED, ALL TRAINS WILL OPERATE AT MAXIMUM AUTHORIZED SPEEDS.

CSX TRANSPORTATION OFFICERS:

R. L. CART, GENERAL MANAGER, C&O BUSINESS UNIT, WILL COORDINATE AND HAVE SOLE CONTROL OVER THE MOVEMENTS OF ALL THREE SPECIAL TRAINS AS DIRECTED BY THE USSS AND THE AMTRAK/CSXT OPERATING PLAN.

G. L. GIBSON, GENERAL MANAGER, OPERATING PRACTICES, WILL ACCOMPANY TO ASSIST IN THE OPERATION AND ADDRESS ANY SAFETY OR RULES ISSUES THAT MIGHT ARISE.

R. H. YOUNG, JR., AVP-PASSENGER SERVICES/NRPC OFFICER, WILL REPRESENT CSXT AND WILL ACCOMPANY THESE SPECIAL TRAINS TO ADMINISTRATE MATTERS, COORDINATING WITH AMTRAK AND OTHERS FROM HUNTINGTON TO CHICAGO.

OTHER GUESTS:

MR. A. R. (PETE) CARPENTER, PRESIDENT & CEO, WILL RIDE FROM HUNTINGTON TO A POINT TO BE DETERMINED. ROBERT W. SHINN, RESIDENT VICE PRESIDENT, CSX CORP., RICHMOND, VA, WILL RIDE V.I.P. CAR FROM HUNTINGTON TO COLUMBUS, OH.

SPECIAL TRAIN NUMBERS HAVE BEEN ASSIGNED AS FOLLOWS:

1ST TRAIN P98925 - 2ND TRAIN P99025 - THIRD TRAIN P99125

APPENDIX A
of EXHIBIT 1
Page 3 of 3

ALL PASSENGERS, INCLUDING SUPERVISORY AND OPERATING PERSONNEL, MUST HAVE BEEN PRE-CLEARED BY THE USSS. EVERYONE ABOARD THE TRAINS MUST CONSPICUOUSLY WEAR THEIR SECURITY CLEARANCE TAGS AT ALL TIMES.

THESE NUMBERS MUST BE SHOWN ON ALL TIME TICKETS, VOUCHERS ETC FOR PAYROLL VERIFICATION WHILE USING CSXT CREWS.

THESE SPECIAL TRAINS WILL BE OPERATED UNDER THE TERMS OF THE CSXT/AMTRAK OPERATING AGREEMENT COVERING MOVEMENT AND STORAGE CHARGES. ANY ADDITIONAL CHARGES MUST BE REPORTED TO PASSENGER SERVICES FOR REBILLING TO AMTRAK, REFERENCE AMTRAK'S AUTHORIZATION NOTICE NO. CSXT-6A-9280.

EVERY EFFORT AND CONSIDERATION SHOULD BE AFFORDED THE OPERATION OF THESE SPECIAL TRAINS TO EXEMPLIFY A HIGH PERFORMANCE ORGANIZATION, ENSURING AN EXCELLENT PERFORMANCE.

R. H. YOUNG, JR.
AVP-PASSENGER SERVICES

COPIES:

A. R. CARPENTER	AU7
G. L. NICHOLS	ANO
C. N. TAYLOR	ANO
F. E. PURSLEY	TRF
D. S. LIERMAN	FAX: 202-783-2603
W. M. CANTRELL	RSA
M. L. WALL	L2X
T. M. FIORENTINO	BZ9
L. J. LUDBAN	LE1
R. J. GREMILLION	DEM P00
D. L. PETWAY	RSA
R. G. THIGPEN	LE1
C. D. GRADY	OP1
M. ERENBERG	OP1
W. E. MIMMS	AQB
M. A. WALDREN	AQB
CREW MANAGEMENT	N10
J. B. BOEHLE	CDA
G. T. BOWDEN	B81
DIRECTOR PERFORMANCE	DA1 UR3
AMTRAK PASSENGER DESK	OPZ
MECHANICAL DESK	OP3 UR6
H. S. JAMES	DHQ
G. A. COTTAVE	NQQ
D. W. BRADSHAW	AKV UR6
K. L. JOHNSON	KLJOHNSO
J. R. WILSON	JRWILSON
L. W. LYNINGER	LWLYNING

ARTICLE THREE

THE SERVICES

Section 3.1. Right to Services.

Subject to and in accordance with the terms and conditions of this Agreement, Railroad hereby agrees to provide NRPC, over Rail Lines of Railroad, with the services requested by NRPC for or in connection with the operation of NRPC's Intercity Rail Passenger Service, including the carrying ✓ of mail and express on Intercity Rail Passenger Trains to the extent authorized by the Act. The initial services with respect to Railroad shall be as provided in Appendix B and shall be compatible with the physical capabilities of Railroad.

Section 3.2. Modification of the Services.

NRPC shall have the right from time to time to request, and subject to and in accordance with the terms and conditions of this Agreement Railroad hereby agrees to provide, modified or additional services. Such requests shall be made by filing an amendment to Appendix B with Railroad on a date sufficiently in advance of the date upon which such amendment is to become effective to permit adequate joint planning and joint preparation for the modified or additional services provided for in such amendment. The services requested in any such amendment shall be subject to the physical and financial capabilities of Railroad and shall give due regard to Railroad's speed, weight and similar operating restrictions and rules and safety standards and to the avoidance of

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unreasonable interference with the adequacy, safety and efficiency of its other railroad operations. In applying the foregoing, recognition shall be given to the importance of fast and convenient schedules and passenger comfort and convenience to the success of NRPC's Intercity Rail Passenger Service.

Section 3.3. Provision of the Services.

Railroad further agrees to provide and furnish all labor, materials, equipment and facilities necessary to perform the services to be provided under Sections 3.1 and 3.2 (except as the same are provided by NRPC), but shall not, except as is otherwise provided in this Agreement or upon agreement with NRPC, be required to purchase, construct, rebuild or replace Rail Lines, locomotives, cars, rolling stock or ancillary facilities (as defined in Section 3.8).

Railroad shall provide services hereunder in an economic and efficient manner and shall give appropriate recognition to the importance of on-time passenger train operations and passenger comfort and convenience. Railroad shall make every reasonable effort to maintain the schedules established by NRPC for its Intercity Rail Passenger Service. From time to time NRPC will deliver to Railroad, pursuant to Section 3.2, requests regarding manner and standards of operation designed to refine and make precise the foregoing and to bring about nationally high and uniform standards of intercity rail passenger operations.

AMTRAK AND SOO LINE RAILROAD -- USE OF TRACKS AND
FACILITIES AND ESTABLISHING JUST COMPENSATION

Finance Docket No. 31062

INTERSTATE COMMERCE COMMISSION

1987 ICC LEXIS 239

June 25, 1987

SYLLABUS:

[*1]

We will grant the application filed on June 11, 1987, by the National Railroad Passenger Corporation (Amtrak) under section 402(a)(1) of the Rail Passenger Service Act, as amended (RPSA), 45 U.S.C. 562(a)(1). The Soo Line Railroad (Soo) is required to provide Amtrak with access to its tracks and other facilities between Chicago and Oshkosh, WI, and to provide such services as are required by Amtrak for it to operate two special trains on August 1 and 2, 1987. Because of the inability of the parties to agree upon compensation, we will also institute a proceeding to determine just and reasonable compensation for the trip.

PANEL:

By the Commission, Chairman Gradison, Vice Chairman Lamboley, Commissioners Sterrett, Andre, and Simmons.

OPINION:

BACKGROUND

Amtrak filed this application with the Commission on June 11, 1987, after failing to come to an agreement with the Soo concerning the proposed operation of two special round-trip trains for the 20th Century Railroad Club of Chicago (Club) to transport passengers from Chicago, IL to an air show at the Oshkosh Airport in Wisconsin on August 1 and 2, 1987.

Amtrak presently operates regularly scheduled rail passenger service over part of the proposed [*2] route between Chicago Union Station and Duplainville, WI. This 102.2-mile segment was previously owned by the Milwaukee Railroad (Milwaukee) and is subject to an operating agreement (Basic Agreement) which Amtrak entered into with the Milwaukee and which was assumed by the Soo when it acquired the Milwaukee. There is no existing passenger service nor operating agreement over the Soo's line between Duplainville and the Oshkosh Airport, a distance of 69.4 miles.

On March 18, 1987, Amtrak submitted a proposed schedule to the Soo for the Club's trip to the air show and requested Soo's concurrence in operating the special trains on August 1 and 2, 1987. In a letter dated May 18, 1987, Soo declined the request to run special Amtrak trains between Duplainville and Oshkosh, WI.

In its application, Amtrak states that its Operating Engineering Task Force conducted an inspection trip on May 13 and 14, 1987, and has evaluated Soo's main line between Duplainville and Oshkosh. The Task Force concluded that the

line is in excellent condition and, under present signaling, is suitable for the operation of passenger trains at 45 miles-per-hour. Amtrak submits that the proposed trip on behalf [*3] of the Club falls within the purposes of the RPSA and requests that we issue an order requiring the Soo to permit Amtrak to operate the special trains on the requested dates. It proposes that the terms and conditions of the present Amtrak-Milwaukee Road Agreement also be made applicable to the Duplainville-Oshkosh segment of the special train movement.

On June 18, 1987, the Soo filed a reply in opposition to Amtrak's application. Soo claims that the excursion trains will create an impediment to its freight operations on the scheduled dates. It characterizes the excursion trip as "purely a recreational usage" and not for "legitimate freight or passenger transportation." Soo argues that Amtrak's request is not necessary to carry out the purposes of the RPSA and that the "excursion trains accommodate a mere casual private fascination with rail transport and do not serve to promote the larger public convenience and necessity . . .".

Soo's primary concern appears to be the liability issue. In the event of an accident, Soo believes that the potential liability with regard to passenger suits poses a very significant risk of loss for which it is not being adequately compensated. Soo [*4] is concerned about the position which Amtrak has taken in a January 4, 1987 Conrail collision limiting Amtrak's responsibility to indemnify Conrail for any losses attributable to negligence. Soo argues that Amtrak's interpretation that there exists an exculpation from responsibility outside the indemnity terms of the Basic Agreement in cases of gross negligence constitutes an avoidance of Amtrak's contractual obligations and a failure of consideration n1 rendering the Basic Agreement null and void. Soo argues further that Amtrak's position in the Conrail case evinces an anticipatory failure of consideration and breach of contract for any extensions of Amtrak's operations under the existing Basic Agreement. Soo also argues that Amtrak presently has no contractual right to operate its trains over non-former Milwaukee lines and states that it has no intention of entering into such an agreement respecting those lines. It is Soo's position that, without a contractual right to operate over the Duplainville to Oshkosh, WI part of its intended route, Amtrak cannot legally operate its excursion train.

n1 According to Soo's contractual theory, the railroads that entered into the Basic Agreement with Amtrak were motivated to dispense with their respective passenger operations due to the tremendous potential liability associated with it. Soo argues that to remove this element of consideration from the Basic Agreement is tantamount to a failure of consideration. [*5]

Amtrak responded to Soo's objections in a pleading filed June 19, 1987. In regard to Soo's allegation that the operation of the special trains will interfere with its freight operations, Amtrak asserts that no interference will occur. Nevertheless, it states that it is willing to allow Soo to give priority to its own freight operations by having Amtrak special trains use the siding tracks in the event of "any meets." In response to Soo's argument as to the legitimacy of the rail travel, Amtrak replies that, under the RPSA, recreational travel is just as legitimate as business travel. According to Amtrak, a high percentage of its riders and revenues are derived from recreational travel, both on regularly scheduled and special trains. Finally, on the liability issue, Amtrak explains that its position in the pending dispute with Conrail over the January 4, 1987 accident involves an interpretation of the terms of the indemnification agreement which is consistent with decisional law. Amtrak

submits that this issue is one for the courts to decide and not the Commission.

DISCUSSION AND CONCLUSIONS

Under section 402(a) of the RPSA, Amtrak may contract with railroads for the use of [*6] tracks and other facilities and the provision of services on such terms and conditions as the parties may agree. In the event of a failure to agree, the Commission is empowered to order the provision of services or the use of tracks or facilities of the railroad by Amtrak if we find that doing so is necessary to carry out the purposes of the RPSA. The Commission may also fix just and reasonable terms of compensation.

The question to be decided is whether Amtrak's access to Soo's track under the circumstances presented is necessary to carry out the purposes of the RPSA. Amtrak argues that it is necessary and cites to one of the Congressional findings in the RPSA "that to the maximum extent feasible travelers in America should have the freedom to choose the mode of transportation most convenient to their needs." n2 Amtrak also points to one of the Congressional goals of the RPSA, which is that Amtrak ". . . undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies." n3

n2 45 U.S.C. 501(a).

n3 45 U.S.C. 501a(14).

Soo acknowledges that Amtrak's legislative directive is to maximize its revenues. [*7] Soo argues that such is to occur only when compatible with existing rail transportation movements. Soo attempts to minimize the importance of the proposed excursion trip in comparison to its own freight operations, stating:

to enable Amtrak to disrupt freight operations on an occasional basis to accommodate rail buffs in reality forces Soo and its customers to subsidize this unnecessary private service through liability exposure, expense and inconvenience. Soo submits that its use of these lines for freight operations is, of the two, truly necessary to carry out the rail transportation policy of the United States.

We are not required under the RPSA statute to elevate freight service over passenger transportation. n4 Likewise, there is nothing in that statute which distinguishes occasional recreational use from other passenger transportation. On the contrary, Congress amended the RPSA in 1979 by adding section 402(g) requiring Amtrak to enter into an industry-wide contract with the railroad industry in order to obtain the ability to run charter trains on a reasonable basis. It was the intent of Congress that Amtrak encourage the use of charter trains because such operations [*8] can, at a minimum, be run on a break-even basis. n5 Neither Amtrak nor the operating railroads were able to develop a constructive proposal for such an agreement and subsection (g) was eventually deleted after Congress determined that it was unnecessary in light of the ". . . current arrangement of working out the details of charter and special train movements" n6

n4 In fact, under 45 U.S.C. 562(e), intercity or commuter passenger trains are to be given preference over freight trains in the use of any given line

of track, junction, or crossing. Any railroad whose rights are affected with regard to freight train operation may file an application with the Secretary of Transportation requesting appropriate relief.

n5 H.R. REP. NO. 96-189, 96th Cong., 1st Sess. 32, reprinted in [1979] U.S. CODE CONG. & AD. NEWS 1198, 1212.

n6 H.R. REP. NO. 99-149, 99th Cong. 1st Sess. 21 (1985). The deletion of subsection (g) was part of the Amtrak authorization bill (H.R. 2266) which passed the House on September 19, 1985. The provisions of the bill were added as an amendment to H.R. 3500, the "Consolidated Omnibus Reconciliation Act of 1985."

The operation of special trains is thus [*9] contemplated by Congress as a legitimate and proper undertaking by Amtrak under the Act. We will not second-guess Amtrak's business judgment in deciding to operate the special trains for the Club. We find that an order requiring Soo to make available tracks to permit Amtrak to operate special trains between Chicago, IL and Oshkosh, WI, August 1 and 2, 1987, as sought by Amtrak is necessary to carry out the purposes of the RPSA and will not unduly interfere with Soo's use of its property to conduct normal freight operations. In fact, Amtrak has agreed that Soo may give its freight trains priority over this Amtrak operation.

With regard to the liability issue, Amtrak's litigation posture in an unrelated case has no bearing on the question of whether we should require Soo to provide Amtrak with the access and services it requests in this proceeding. Rather, it goes to the question of the compensation that Soo should receive for the risk it bears. Soo's allegation that it will not be adequately compensated for the risk of loss it may incur must be addressed in determining the amount of compensation to be awarded in this case.

The evidence of record does not contain sufficient information [*10] for us to determine what is just and reasonable compensation under the circumstances. We will initially order the compensation and indemnification suggested by Amtrak. We will also set the matter of compensation and indemnification for modified procedure. To ensure the development of a complete record, each party will file an opening statement and a reply. Final action on these matters will await a final decision on the evidence presented by the parties. Amtrak should be aware that the amount of compensation could be increased substantially based on the risk of loss factor.

This action will not significantly affect either the quality of the human environment or energy conservation.

It is ordered:

1. The Soo Line Railroad must provide the National Railroad Passenger Service Corporation with those services, tracks, and facilities, including rights of access to track and facilities necessary to allow the latter to operate two special trains on August 1 and 2, 1987, between Chicago, IL and Oshkosh, WI.

2. The establishment of just and reasonable terms and conditions for the provision by the Soo Line Railroad of necessary services, tracks and facilities shall be handled under [*11] modified procedure. The parties must comply

with the applicable provisions of 49 CFR 1112.1 through 10.

3. The National Railroad Passenger Service Corporation must compensate and indemnify the Soo Line Railroad in conformity with the terms and conditions of the present Amtrak-Milwaukee agreement.

4. This payment is not a final compensation. The terms finally determined will have retroactive effect to the dates of August 1 and 2, 1987, with proper consideration for those payments made by the National Railroad Passenger Corporation in accordance with ordering paragraph 3.

5. On July 20, 1987, the National Railroad Passenger Corporation and Soo Line Railroad shall submit verified statements on matters relating to just and reasonable terms and conditions for the operation of the special trains and the provision of services, tracks and facilities required. The National Railroad Passenger Corporation and the Soo Line Railroad shall file verified statements in reply by August 18, 1987.

6. This decision is effective on the date it is served.